Vinodh a/l Mariappa v Ketua Pengarah Eksekutif, Lembaga Pembangunan Pelaburan Malaysia, CEO MIDA & Ors

HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW APPLICATION NO WA-25–151–05 OF 2020
NOORIN BADARUDDIN J
1 JULY 2021

Administrative Law — Judicial review — Application for — Applicant employed by Malaysian Development Investment Authority ('MIDA') as Grade 9 executive officer — Promotion committee approved applicant's acting post as Grade 10 executive officer — Applicant was not confirmed as Grade 10 executive officer — Whether respondents breached employment contract — Whether documents relied upon by applicant had no force of law — Whether applicant was public servant — Whether MIDA had legal and statutory duty to confirm applicant as Grade 10 executive officer — Whether application was incompetent because applicant had wrongly named the parties — Federal Constitution art 135(1) — Malaysian Investment Development Authority (Incorporation) Act 1965 ss 3(1), 3E, 13 & 14 — Rules of Court 2012 O 53 r 3(2)

The applicant was employed by the Malaysian Development Investment Authority ('MIDA') vide a letter dated 18 September 2007 ('the employment contract'). At the material time, the applicant's position in MIDA was Grade 9 executive officer and by a letter dated 31 October 2018, the chief executive officer of MIDA had informed the applicant that the promotion committee had approved his acting post as Grade 10 executive officer. However, considering that the applicant had not attained satisfactory level of competence based on his annual performance appraisal, the applicant could not be confirmed as a Grade 10 executive officer and subsequently reverted to his original position as Grade 9 executive officer. The applicant then filed the present judicial review application ('the application') pursuant to O 53 r 3(2) Rules of Court 2012 for, inter alia, an order for his promotion be confirmed. The applicant submitted that: (a) he satisfied the test of being a public servant as his salary was paid by the government and that MIDA was a public body, as such, his application herein was amenable to judicial review; and (b) he should be promoted to Grade 10 executive officer and the respondents had breached the terms in 'Terma dan Syarat Perkhidmatan MIDA', 'Garis Panduan Pemangkuan Kenaikan Pangkat', 'Pekeliling 3/2009' and 'Pekeliling 7/2010' ('the documents'). In opposing the application, the respondents submitted that: (i) the application was not suitable to be dealt with through judicial review and that this application was misplaced; (ii) the documents had no force of law; (iii) the applicant was not a public servant, MIDA was not a public authority and the remedies sought by the applicant as a public servant was misconceived;

A and (iv) the application was incompetent as the applicant had wrongly named the parties.

Held, dismissing the application with costs of RM15,000 to the respondents:

B (1) Section 3E of the Malaysian Industrial Development Authority (Incorporation) Act 1965 ('Act 397') stated that the appointment of officers and servants of MIDA may be subject to such conditions of service as may be prescribed by regulations. It was the Minister who on the recommendation of the Board may make such regulations pursuant to s 14 of Act 397. In the present application, it was not stated or shown C that any of the documents relied upon by the applicant had been adopted or promulgated in any regulations pursuant to s 3E and/or s 14 of Act 397. Therefore, the court agreed with the respondents' contention that the documents had no force of law (see paras 28–29 & 32).

D (2) The officers and servants of a statutory body were deemed to be a public servant for a specific purpose. In the present case, the officers, servants and agents of MIDA were deemed to be a public servant under s 13 of Act 397. If the officers and servants of body corporate were indeed a public servant, there was no necessity for them to be deemed as public servants E (see para 38).

(3) Clause 5(e) of the employment contract specifically stated that the conditions/terms of employment were in accordance with the service in MIDA and not as in the civil service. Further, the applicant's employment contract was not issued by the Public Service Commission F but instead by MIDA as a body corporate. It was clear that the applicant did not belong to the public service under the Federal Constitution ('the FC') and therefore was not a public servant. Accordingly, the safeguards for civil servants provided in art 135(1) of the FC did not apply to the G applicant (see paras 42–43).

(4) MIDA did not perform a public duty or function in hiring its employees and in dealing with matters related to their promotions. In other words, there was no public law element in the applicant's employment contract. The decision of MIDA in returning the applicant to his substantive H position was not a statute-based decision but instead was made pursuant to the employment contract. There was absolutely no legal and statutory duty on the part of MIDA whether by statute or any other legal instruments to confirm the applicant in Grade 10 or to compel MIDA to perform any of the prayers sought by the applicant. It was the I management prerogative of MIDA to exercise discretion concerning the employment of their officers and servants including in matters relating to their promotion. Eligibility to be promoted could not be equated with entitlement. It was not for the court to go behind the reasons as to why the applicant was not promoted and usurp the powers vested with the

management of MIDA to make a finding. The court could not re-evaluate the evaluation done on the applicant and substitute its opinion with that of MIDA (see paras 44, 48 & 54).

(5) The court agreed with the respondents' contention that the respondents were wrongly named by the applicant as their job titles or positions were not entities recognised under Act 397. The only entity created by Act 397 was MIDA pursuant to s 3(1) of the same Act and MIDA was not named as a party herein. The applicant's application was therefore incompetent (see paras 49 & 53).

[Bahasa Malaysia summary

Pemohon telah diambil bekerja di Lembaga Pembangunan Pelaburan Malaysia ('MIDA') melalui surat bertarikh 18 September 2007 ('kontrak pekerjaan'). Pada masa yang material, jawatan pemohon dalam MIDA ialah pegawai eksekutif Gred 9 dan melalui surat bertarikh 31 Oktober 2018, ketua pegawai eksekutif MIDA telah memaklumkan pemohon bahawa jawatankuasa kenaikan pangkat telah meluluskan jawatannya sebagai pemangku pegawai eksekutif Gred 10. Bagaimanapun, memandangkan pemohon tidak mencapai tahap kecekapan yang memuaskan berdasarkan penilaian prestasi tahunannya, pemohon tidak dapat disahkan sebagai pegawai eksekutif Gred 10 dan seterusnya dikembalikan ke jawatan asalnya sebagai pegawai eksekutif Gred 9. Pemohon kemudiannya memfailkan permohonan semasa untuk semakan kehakiman ('permohonan tersebut') menurut A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 untuk, antara lain, perintah supaya kenaikan pangkatnya disahkan. Pemohon berhujah bahawa: (a) dia telah memenuhi ujian sebagai penjawat awam kerana gajinya telah dibayar oleh kerajaan dan MIDA adalah badan awam, oleh itu, permohonannya ini boleh dibuat melalui semakan kehakiman; dan (b) dia sepatutnya dinaikkan pangkat kepada pegawai eksekutif Gred 10 dan responden-responden telah melanggar syarat-syarat dalam 'Terma dan Syarat Perkhidmatan MIDA', 'Garis Panduan Pemangkuan Kenaikan Pangkat', 'Pekeliling 3/2009' dan 'Pekeliling 7/2010' ('dokumen-dokumen tersebut'). Dalam menentang permohonan tersebut, responden-responden berhujah bahawa: (i) permohonan tersebut tidak sesuai untuk ditangani melalui semakan kehakiman dan tersasar; (ii) dokumen-dokumen tersebut tidak mempunyai kuasa undang-undang; (iii) pemohon bukan penjawat awam, MIDA bukan pihak berkuasa awam dan remedi yang dimohon oleh pemohon sebagai penjawat awam adalah satu salah faham; dan (iv) permohonan tersebut adalah tidak kompeten kerana pemohon telah tersilap menamakan pihak-pihak.

Diputuskan, menolak permohonan dengan kos RM15,000 kepada responden-responden:

(1) Seksyen 3E Akta Lembaga Pembangunan Industri Malaysia (Pemerbadanan) 1965 ('Akta 397') menyatakan bahawa pelantikan

pegawai-pegawai dan pekhidmat-pekhidmat MIDA mungkin tertakluk kepada syarat-syarat perkhidmatan seperti yang ditetapkan oleh peraturan-peraturan. Menteri di atas syor daripada Lembaga yang boleh membuat peraturan-peraturan sedemikian menurut s 14 Akta 397. Dalam permohonan ini, tidak dinyatakan atau ditunjukkan bahawa mana-mana dokumen tersebut yang dirujuk oleh pemohon telah diterima pakai atau digubal dalam apa-apa peraturan menurut s 3E dan/atau s 14 Akta 397. Oleh itu, mahkamah bersetuju dengan hujah responden-responden bahawa dokumen-dokumen tersebut tidak mempunyai kuasa undang-undang (lihat perenggan 28–29 & 32).

(2) Pegawai-pegawai dan pekhidmat-pekhidmat badan berkanun dianggap sebagai penjawat awam untuk tujuan tertentu. Dalam kes ini, pegawai-pegawai, pekhidmat-pekhidmat dan ejen-ejen MIDA dianggap sebagai penjawat awam di bawah s 13 Akta 397. Jika pegawai-pegawai dan pekhidmat-pekhidmat pertubuhan perbadanan sememangnya merupakan penjawat awam, tidak ada keperluan untuk mereka dianggap sebagai penjawat awam (lihat perenggan 38).

(3) Klausa 5(e) kontrak pekerjaan tersebut secara khusus menyatakan bahawa syarat-syarat/terma-terma pekerjaan adalah mengikut perkhidmatan MIDA dan bukan seperti dalam perkhidmatan awam. Tambahan pula, kontrak pekerjaan pemohon tidak dikeluarkan oleh Suruhanjaya Perkhidmatan Awam sebaliknya oleh MIDA sebagai sebuah badan korporat. Adalah jelas bahawa pemohon tidak tergolong dalam perkhidmatan awam di bawah Perlembagaan Persekutuan ('PP') dan oleh itu bukan merupakan penjawat awam. Oleh yang demikian, perlindungan untuk penjawat awam yang diperuntukkan dalam perkara 135(1) PP tidak terpakai kepada pemohon (lihat perenggan 42–43).

(4) MIDA tidak menjalankan tanggungjawab atau fungsi awam dalam mengambil pekerja-pekerjanya dan dalam menangani perkara yang berkaitan dengan kenaikan pangkat mereka. Dalam erti kata lain, tiada unsur undang-undang awam dalam kontrak pekerjaan pemohon. Keputusan MIDA dalam mengembalikan pemohon ke jawatan substantifnya bukanlah keputusan berasaskan Akta tetapi sebaliknya dibuat menurut kontrak pekerjaan. Tiada kewajipan perundangan dan berkanun di pihak MIDA sama ada melalui Akta atau mana-mana instrumen undang-undang lain untuk mengesahkan pemohon dalam Gred 10 atau untuk memaksa MIDA menunaikan mana-mana permohonan yang dimohon oleh pemohon. Adalah menjadi prerogatif pengurusan MIDA untuk menggunakan budi bicara mereka berhubung pengambilan pegawai-pegawai dan pekhidmat-pekhidmat mereka termasuk dalam hal berkaitan kenaikan pangkat mereka. Kelayakan untuk dinaikkan pangkat tidak boleh disamakan dengan hak. Mahkamah tidak boleh membicarakan alasan-alasan mengapa pemohon

tidak dinaikkan pangkat dan merampas kuasa yang diberikan kepada pengurusan MIDA untuk membuat keputusan. Mahkamah tidak boleh menilai semula penilaian yang telah dibuat ke atas pemohon dan menggantikan pendapatnya dengan pendapat MIDA (lihat perenggan 44, 48 & 54).

(5) Mahkamah bersetuju dengan hujahan responden-responden bahawa responden-responden telah tersilap dinamakan oleh pemohon kerana nama jawatan atau jawatan mereka bukanlah entiti yang diiktiraf di bawah Akta 397. Satu-satunya entiti yang diwujudkan oleh Akta 397 ialah MIDA menurut s 3(1) Akta yang sama dan MIDA tidak dinamakan sebagai pihak dalam kes ini. Oleh itu, permohonan pemohon adalah tidak kompeten (lihat perenggan 49 & 53).]

Cases referred to

Ang Ek Koon v Director, Public Works Department Sarawak & Ors [2020] MLJU 594; [2020] 7 CLJ 423, HC (refd)

Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors [2007] 2 MLJ 761; [2006] 8 CLJ 114, HC (refd)

Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia [1989] 3 MLJ 298, HC (refd)

Dr Che Wan Fadhil bin Che Wan Putra dan lain lain (menuntut bagi pihak mereka sendiri dan bagi pihak 127 orang yang lain) lwn Universiti Teknologi Malaysia [2010] 9 MLJ 736; [2010] 8 CLJ 845, HC (refd)

Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors [2021] 1 MLJ 549; [2021] 1 CLJ 155, CA (refd)

Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri [2019] 2 MLJ 433; [2019] 2 CLJ 772, CA (refd)

Mohd Khir bin Toyo v PP [2015] 5 MLJ 429, FC (refd)

Rasiah Munusamy v Public Services Commission [1967] 1 AC 348, PC (refd)

Rosneli Kundor v Kelantan State Economic Development Corporation [2004] 4 CLJ 492, CA (refd)

Sulaiman Mat Tekor & Ors v National Population and Family Development Board [2009] 7 MLJ 325; [2008] 10 CLJ 581, HC (refd)

Wang Choon Yin lwn Dato' Seri Hj Mustafar bin Hj Ali, Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) dan lain-lain [2020] 5 MLJ 793. CA (refd)

Legislation referred to

Armed Forces Act 1972 s 51

Federal Constitution art 135(1)

Franchise Act 1998

Malaysian Investment Development Authority (Incorporation) Act 1965 ss 3(1), 3A, 3D, 3D(3), 3E, 3E(1), 6B, 7A, 10, 10A, 13, 14

Penal Code ss 21, 21(i), 165

A Rules of Court 2012 O 53 r 3(2)
Universities and University Colleges Act 1971

Yougesswary Singam (Santhini Thanapalan with her) (Chambers of Yougesswary Singam) for the applicant.
B *Paari Perumal (K Kulasekar with him) (K Kulasekar & Assoc) for the respondents.*

Noorin Badaruddin J:

C **[1]** This is an application for judicial review filed by applicant for inter alia an order of this Court for his promotion be confirmed. Leave was granted by this court on 17 June 2020 (encl 9).

BACKGROUND FACTS

D **[2]** The applicant commenced his employment with the Malaysian Investment Development Authority ('MIDA') as Grade E41 officer on 1 October 2007 to 31 November 2010 in various departments.

E **[3]** On 1 January 2013 all Grade E41 officer were converted to Grade 9.

[4] Effective 1 January 2013 to 23 January 2017 the applicant was posted to '*Bahagian Tarif* and 'Bahagian Pengurusan Talent Industri'

F **[5]** On 16 April 2018 to 31 December 2018, the applicant as Grade 9 officer was posted to 'Bahagian Penyeragaman Dan Penyelarasan Insentif' ('ICCO').

G **[6]** Vide email of 12 November 2017 the Human Resource Division of MIDA had opened invitation to the officers to participate in Assessment Invitation to Grade 9 officers on 15 December 2017. The main objective of the Assessment is to ascertain and identify the level of competence of MIDA officers and to help formulate a plan for personal development ('personal
H development plan').

[7] Vide letter 31 October 2018, the Chief Executive Officer ('CEO') of MIDA informed the applicant that the Promotion Committee had approved his acting post as Executive Officer Grade 10 effective 1 November 2018.

I **[8]** On 16 November 2018 the applicant received a memo from the Human Resource Department and was informed that he is to be placed as 'Penolong Pengarah Kanan' acting Grade 10 at the 'Bahagian Sekretariat Pelaburan Nasional' effective 3 December 2018.

[9] The applicant's transfer to the 'Bahagian Sekretariat Pelaburan Nasional' was postponed to 1 January 2019 on the request of his superior at his post at the material time. The applicant then reported to the 'Bahagian Sekretariat Pelaburan Nasional' on 2 January 2019 as 1 January 2019 was a public holiday.

[10] On 10 July 2019, the applicant was informed through a letter dated 10 July 2019 that he cannot be confirmed as a Grade 10 Executive Officer on the ground that he has not attained satisfactory level of competence since his mark in his annual performance appraisal ('LNPT') was 40.8%. The applicant was reverted to his original position as Executive Officer Grade 9 effective from 10 July 2019 and he remained at the 'Bahagian Sekretariat Pelaburan Nasional'. The applicant's appealed against the decision was considered by the 'Jawatankuasa Kenaikan Pangkat II' and MIDA Nomination and Remuneration Committee and he was informed that his appeal 'tidak dapat dipertimbangkan'. The applicant then filed the present application.

[11] At the leave stage, upon objection raised by the Federal Counsel, the applicant withdrew his application against the Government of Malaysia as the seventh respondent.

THE RELIEFS SOUGHT

[12] The reliefs sought by the applicant pursuant to O 53 r 3(2) of the Rules of Court 2012 are as stated in his Statutory Statement (encl 2).

[13] The applicant sought 23 reliefs of certiorari, mandamus and declaration enumerated from para 2 (a) to (w) in encl 2. The grounds supporting the reliefs sought are stated from para 60 to 100 of encl 2. Suffice to state here that chief among the applicant's claim through this judicial review is for the court to order that his promotion to Grade 10 be confirmed as of 1 May 2019 as stated in para 2(n) of encl 2.

SUMMARY OF THE APPLICANT'S CONTENTIONS

[14] Summarily, the applicant contends that:

(a) there is gross procedural impropriety in his assessment;

(b) that the computation of his duration on the acting post or 'tempoh pemangkuan' is erroneous; and

(c) he satisfies the test of being a public servant as his salary was paid by the government and that MIDA is a public body. As such his application herein is amenable to judicial review.

SUMMARY OF THE RESPONDENTS' CONTENTIONS

[15] The respondents take the position that the applicant's application herein is not suitable to be dealt with through judicial review and that this application is misplaced. It is also contended that the documents relied upon by the applicant in support of his application have no force of law. According to the respondent, the applicant is not a public servant, MIDA is not a public authority and the remedies sought by him as a public servant is misconceived. Further, the instant application is said to be incompetent as the applicant is argued to have wrongly named the parties herein.

FINDINGS

[16] The applicant is an employee of MIDA, an 'Authority' established under sub-s 3(1) of the Malaysian Investment Development Authority (Incorporation) Act 1965 ('Act 397') which states that:

> 3 Establishment of the Authority
>
> (1) *A body corporate by the name of the 'Malaysian Investment Development Authority' is established.*
>
> (2) The Authority shall have perpetual succession and a common seal.
>
> (3) Subject to and for the purposes of this Act, the Authority may, upon such term as it deems fit —
>
> (a) enter into contracts;
>
> (b) acquire, purchase, take, hold and enjoy movable and immovable property of every description; and
>
> (c) convey, assign, surrender, charge, mortgage, demise, re-assign, transfer, or otherwise dispose of, or deal with, any movable or immovable property or any interest vested in the Authority. (Emphasis added.)

[17] Apart from being a body corporate under sub-s 3(1) of Act 397, MIDA may enter contracts (sub-s 3(3)(a)), performs through a Board (s 3A) and under s 3E(1) of the same of Act 397, may appoint such number of its officers and servants as it thinks desirable and necessary who shall be paid such remuneration and allowances and be subjected to such conditions of service as may be prescribed by regulations.

[18] All functions and powers of MIDA are exercised by the Board under s 6B of Act 397. The Board has the power to delegate powers and functions to certain persons including the CEO and such powers and functions so exercised by the CEO or any other persons delegated, is deemed to be done by the Board under s 7A Act 397. The Board may appoint committees for among others to select and recruit officers and servants, disciplinary matters and the committee

shall regulate their own procedure under s 7B Act 397.

[19] It is to be noted that officers, servants and agents of MIDA are deemed to be a public servant under s 13 Act 397.

[20] Under s 14 Act 397, the Minister may make regulations to provide for among others, conditions of service of officers and servants of MIDA.

[21] The offer of employment vide letter dated 18 September 2007 by MIDA to the applicant (at pp 31–34 of encl 3) is in fact the employment contract (the 'employment contract'). This court finds that the employment contract is a contract for personal service between a body corporate and an individual. It is akin to any other contract between a master and servant. The employment contract contains terms and conditions and chief amongst them is cl 5(e) which states that the applicant is subject to the conditions of service for statutory body, circulars and other administrative directives issued from time to time in relation to work, conduct and terms of service for MIDA officers. Clause 5(e) of the employment contract states as follows:

> Tuan adalah tertakluk kepada syarat-syarat perkhidmatan bagi pekerja-pekerja Badan Berkanun, Surat-surat Pekeliling dan lain-lain Arahan Pentadbiran yang dikeluarkan dari semasa ke semasa yang berkaitan dengan kerja, kelakuan dan *syarat-syarat perkhidmatan bagi pegawai-pegawai di MIDA.* (Emphasis added.)

[22] It must be borne in mind that the applicant has not been dismissed, or his service being terminated or that he is reduced in rank or even demoted. What the applicant is asserting is that he should be promoted to Grade 10 and that MIDA has infringed the terms and conditions of the employment contract. By that assertion, the applicant relies on documents wherein the respondents are said to have breached the terms therein. The first two documents are:

(a) 'Terms dan Syarat Perkhidmatan MIDA' ('Doc 1') ('VM2' in encl 12); and

(b) 'Garis Panduan Pemangkuan Kenaikan Pangkat' ('Doc 2') ('MIDA1' in encl 10).

[23] Doc 1 states that any employee who has opted to be bound by it (Doc 1) is entitled to the Employment Provident Fund ('EPF') pursuant to para 1.16 and no longer belong to the pension scheme.

[24] Doc 2 is a guideline or 'Garis Panduan' which makes reference to Pekeliling Perkhidmatan Bilangan 7 Tahun 2010 (Panduan Pengurusan Pemangkuan dan Kenaikan Pangkat dalam Perkhidmatan Awam) ('Pekeliling 7/2010').

[25] The next document is Pekeliling 3/2009 ('Pekeliling 3/2009') ie the appraisal form called 'Borang Laporan Penilaian Prestasi Khas ('LNPK') Bagi Pegawai Perkhidmatan Awam'. Significantly, at para 10 under the subheading 'Pemakaian' or Application of Pekeliling 3/2009, it is stated:

> *Tertakluk kepada penerimaannya* oleh pihak berkuasa masing-masing peruntukan Surat Pekeliling Perkhidmatan ini pada keseluruhannya adalah dipanjangkan kepada semua Perkhidmatan Negeri, Pihak Berkuasa Berkanun dan Pihak Berkuasa Tempatan. (Emphasis added.)

[26] Paragraph 1 of Pekeliling 7/2020 which was referred to in Doc 2, states the purpose of the circular is:

> bertujuan memberikan panduan mengenai dasar peraturan dan kaedah pelaksanaan pemangkuan dan kenaikan pangkat serta rayuan pemangkuan dan kenaikan pangkat dalam perkhidmatan awam.

[27] At para 9 of Pekeliling 7/2020 under the subheading 'Pemakaian' or Application, it is again stated that:

> *Tertakluk kepada penerimaannya* oleh pihak berkuasa masing-masing peruntukan Pekeliling Perkhidmatan ini pada keseluruhannya dipanjangkan kepada semua Perkhidmatan Awam Negeri, Pihak Berkuasa Berkanun dan Pihak Berkuasa Tempatan. (Emphasis added.)

[28] It is pertinent to note that in regards to the appointment of officers and servants of MIDA, s 3E of Act 397 states that such appointments may be subject to such conditions of service as may be *prescribed by regulations.* Section 3E states as follows:

> 3E Appointment of officers, servants and other persons
>
> (1) The Authority may appoint such number of officers and servants of the Authority as it thinks desirable and necessary who shall be paid such remuneration and allowances and be subject to such conditions of service as may be prescribed by *regulations.* (Emphasis added.)
>
> *Appointment of officers, servants and other persons 3E. (1) The Authority may appoint such number of officers and servants of the Authority as it thinks desirable and necessary who shall be paid such remuneration and allowances and be subject to such conditions of service as may be prescribed by regulations*.

[29] Where of Act 397 is concerned, it is the Minister who on the recommendation of the Board may make such regulations pursuant to s 14 of Act 397 which states:

> 14 Regulations
>
> (1) *The Minister, on the recommendation of the Board, may make such regulations as may be necessary or expedient for the better carrying into effect of the purpose and provisions of this Act.*

(2) In particular and without prejudice to the generality of subs (1), such regulations may provide for —

(a) the fees to be imposed by the Authority under this Act;

(b) *the remuneration, allowances and conditions of service of officers and servants of the Authority*;

(c) the payment of pensions, allowances or gratuities to officers and servants of the Authority;

(d) the manner, terms and purposes of loans granted to officers and servants of the Authority; and

(e) such other matters which may be prescribed by the Authority under this Act. (Emphasis added.)

[30] In the case of *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* [2021] 1 MLJ 549; [2021] 1 CLJ 155, the Court of Appeal in determining whether a 'Buku Panduan' which serves as a guideline for the registration of franchise business has a force of law, had held that since the book was not issued pursuant to any enabling provision under the Franchise Act 1998, it has no force of law. The Court of Appeal stated in the following fashion:

[28] Based on our research, the Franchise (Forms And Fees) Regulations (PU(A) 422 of 1999) is the only regulations made by the Minister pursuant to s 60 of the FA 1998. The other two Regulations are:

(i) Franchise (Qualifications of a Franchise Broker) Regulations1999 (PU(A) 423 of 1999) made by the Minister pursuant to s 14(2) of the FA 1998; and

(ii) Franchise (Compounding of Offences) Regulations 1999 (PU(A) 424 of 1999) made by the Minister pursuant to s 41 of the FA 1998.

In light of the above, with respect, we make this observation that the submission on behalf of the plaintiff that the Buku Panduan was issued by the Minister of Domestic Trade and Consumer Affairs pursuant to s 60 FA 1998 is misconceived.

[29] The question of taking any judicial notice does not arise because in light of the existence of the three aforementioned Regulations, it is clear that *the Buku Panduan has not been issued pursuant to any enabling provision under the FA 1998 for it to have the force of law.* We therefore find it unnecessary to refer to the Buku Panduan. (Emphasis added.)

[31] In the case of *Majlis Angkatan Tentera Malaysia v Mohd Nurul Ami bin Mohd Basri* [2019] 2 MLJ 433; [2019] 2 CLJ 772, the respondent therein was charged for breaching the Armed Forces Standing Order, an offence under s 51 of the Armed Forces Act 1972 ('the AFA'). The breach was for being involved in drug abuse. The question that arose before the court was whether the procedure to be followed in the taking of urine samples for purposes of drugs testing was the Health Ministry Guideline ('KKM Guideline') or the Army

Guideline. The Court of Appeal held as follows:

[26] *What then is the status of the Army Guideline? Does it have any force of law? In our view it does. The first thing to note is that it was made under s 15 of the AFA read together with art 137 of the Federal Constitution ('the Constitution').*

[27] The Army Guideline, which can be found at pp 70–80 of the appeal record is dated 14 May 2009 and was signed by the Secretary of the Armed Forces Council. He signed it 'Dengan Perintah Majlis Angkatan Tentera'. *There can be no doubt therefore that the Army Guideline is a guideline that was issued pursuant to a power given by law.*

[28] We reproduce below art 137 of the Constitution and s 15 of the AFA:

> Article 137(1) of the Constitution Armed Forces Council 137(1) There shall be an Armed Forces Council, which shall be responsible under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of, and all other matters relating to the armed forces, other than matters relating to their operational use.
>
> S 15 of the AFA
>
> 15 Regulations governing commissioning, etc., of officers
>
> The Armed Forces Council with the approval of the Yang di-Pertuan Agong may make regulations including regulations providing for matters which may be issued by Perintah Majlis Angkatan Tentera governing the commissioning and appointment of officers, their terms of service, including the absorption, attachment and secondment of any officer to any body, force or service, promotion, advancement in rank, retirement, resignation, dismissal and such other matters as the Armed Forces Council may think necessary or expedient for the better carrying into effect of the provisions of this Part.

[29] Thus, *by virtue of s 15 of the AFA, the Armed Forces Council is empowered by law to make regulations it may think necessary or expedient for the better carrying into effect of the AFA, and this includes issuing the Army Guideline, which was issued by way of the 'Perintah Majlis Angkatan Tentera'. Being made by authority of the Armed Forces Council, the Army Guideline is therefore valid and enforceable.*

[30] *What about the KKM Guideline, does it have any force of law? With regret and with the greatest of respect to the panel of this court that decided Noor shanfuf Rizaf (supra), we are unable to agree that the KKM Guideline has the force of law. In the first place, unlike the Army Guideline, it was not made under any written law.*

[31] *The KKM Guideline was merely a guideline issued by the Ministry of Health through a Circular dated 3 September 2002 and signed by the Director General of the Ministry of Health. The fact that the KKM Guideline makes references to the Dangerous Drugs Act 1952 as observed by this court in Noor Sharifuf Rjzaf does not clothe it with the force of law.*

[32] Paras 1 and 2 of the Circular fortifies our view that it is merely an administrative guideline with no force of law. We reproduce below the two paragraphs which can be found at p 43 of the appeal record:

> Surat Pekeliling Ketua Pengarah Kesihatan Malaysia Bil 6/2002

Garispanduan Bagi Ujian Pengesananan Penyalahgunaan Dadah Dalam Air Kencing

1. Tujuan

Surat ini bertujuan untuk memaklumkan mengenai garispanduan bagi ujian pengesanan penyalahgunaan dadah. Ini adalah untuk menyeragamkan dan mengemaskini prosidur-prosidur ujian pengesanan dadah di makmal-makmal Kementerian Kesihatan Malaysia (KKM) serta sebagai panduan bagi agensi-agensi yang terlibat dalam program pengesanan dadah seperti Agensi Dadah Kebangsaan dan Polis. Selain daripada itu garispanduan ini akan memudahkan proses menulis dokumen kerana terdapat penyeragaman prosedur bagi proses mendapatkan pensijilan ISO/IEC 17025 serta dapat menghasilkan keputusan ujian berkualiti dan diakui kerana semua prosidur dijalankan dengan mengambilkira isu keselamatan, kerahsiaan, kawalan kualiti dan berpandu kepada prosidur-prosidur di peringkat antarabangsa.

2. Latar belakang

Garis panduan ini disediakan berlanjutan dari Bengkel Polisi dan Prosidur Ujian Dadah pada tahun 2000 di mana banyak pertanyaan mengenai polisi dan prosidur samada teknikal atau perundangan telah dikemukakan oleh peserta-peserta yang menghadiri bengkel itu.

Berikutan dengan itu, satu Jawatankuasa Teknikal Polisi dan Prosidur telah diwujudkan yang dianggotai oleh Pakar Patologi, Pegawai Sains dan Juruteknologi Perubatan. Di bawah jawatankuasa ini terdapat dua jawatankuasa kerja iaitu, Jawatankuasa Polisi dan Prosidur Ujian Dadah serta Jawatankuasa Quality Assurance dan Latihan.

Jawatankuasa Teknikal Polisi dan Prosidur Ujian Dadah telah mengadakan beberapa siri mesyuarat serta perbincangan dengan lain agensi seperti pihak Polis dan pihak Peguam Negara dan telah berjaya mengeluarkan satu garispanduan Guidelines For Drugs Abuse Testing untuk rujukan makmal-makmal pengesanan dadah di Kementerian Kesihatan dan agensi-agensi berkaitan di negara ini. (emphasis added)

[33] *It is patently clear that the purpose of the KKM Guideline is to co-ordinate and update the procedure for the taking of urine samples in suspected drug abuse cases and as a guideline to the relevant agencies, including the armed forces. It was not meant to be a legal document having the force of law. For any guideline to have any force of law, it must be made pursuant to a power given by law. This is not the case with the KKM Guideline.* (Emphasis added.)

[32] In the instant application, this Court finds that nowhere is stated or shown that any of the documents ie Doc 1, Doc 2, *Pekeliling 3/2009* and *Pekeliling 7/2010* relied upon by the applicant have been adopted or promulgated in any regulations pursuant to s 3E and/or s 14 of Act 397. Therefore, this court agrees with the respondents' contention that the documents have no force of law. At best, the documents relied by the applicant are guidelines and mechanisms adopted by MIDA as part of the process for

purposes of promotion or career advancement of its officers.

THE APPLICANT'S STATUS

[33] In rebutting the respondents' contention that he is not a public servant the applicant refers and relies on the Federal Court's decision in *Mohd Khir bin Toyo v Public Prosecutor* [2015] 5 MLJ 429 ('Mohd Khir bin Toyo') where the Federal Court laid down the test to determine a public servant as follows:

> The test to determine a person is a public servant is — Question (1) in the service or pay of the Government; and Question (2) whether he is entrusted with the performance of a public duty.

[34] According to the applicant since MIDA uses its fund provided by the government for its expenditure including paying remuneration etc to its employees pursuant to ss 10 and 10A of Act 397, he is in the pay of the Government and therefore a public servant. Sections 10 and 10A of Act 397 state as follows:

> 10 Malaysian Investment Development Authority Fund
>
> (1) For the purposes of this Act, there is established a fund to be known as the 'Malaysian Investment Development Authority Fund', to be administered and controlled by the Board.
>
> (2) The Fund shall consist of —
>
> (a) such sums as may be provided from time to time by the Government;
>
> (b) moneys earned by the Authority in the performance of any of its functions;
>
> (c) donations and contributions received from within or outside Malaysia; and
>
> (d) all other moneys belonging to or which may in any manner become payable to the Authority in respect of any matter incidental to its functions and powers.
>
> 10A Expenditure to be charged on the Fund
>
> The Fund shall be expended for the purposes of —
>
> (a) paying any fees, costs or expenses lawfully incurred by the Authority, including the remuneration, superannuation and other allowances, pensions or gratuities of officers, servants or agents of the Authority;
>
> (b) paying any other costs or expenditure properly incurred or accepted by the Authority in the exercise of its powers or in the performance of its functions;
>
> (c) giving grants, loans or any financial assistance to members of the private sector for purposes approved by the Minister;
>
> (ca) giving financial assistance or credit facilities, with or without interest, or any contribution to any person for educational purposes, scholarships or any other purposes subject to the approval of the Minister with the concurrence of the Minister of Finance;
>
> (d) granting loans for such purposes as may be prescribed by regulations to officers and servants of the Authority; and

(e) generally, paying any expenses for carrying into effect the provisions of this Act. A

[35] This court is of the considered view that the applicant's argument is misplaced. In *Mohd Khir bin Toyo*, the accused/appellant was charged for an offence punishable under s 165 of the Penal Code ('the Code'). The question that arose before the court was whether a Chief Minister was a public servant even when he acted as chairman of the state economic development corporation (SEDC). The court held that under s 21(i) of the Code, the words 'public servant' included 'every officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty. The court found that As Chief Minister and member of the State Legislature, the accused/appellant was clearly in the pay of Government. As head of the State Executive Council, he was in the service of Government and as Chief Minister, he was paid by the Government and entrusted with the performance of a public duty, which meant he was an 'officer' under s 21(i) of the Penal Code. The appellant remained a 'public servant' even while he wore the hat of chairman of PKNS. Therefore, for purposes of prosecution of an offence under the Code, the determination of a public servant must be in accord with the definition provided in s 21 of the Penal Code. Apart from being in the service or pay of the Government, the accused person charged with an offence under the Code must be entrusted with the performance of a public duty. B C D E

[36] In relation to a body corporate such as MIDA the answer as to whether its officers and servants are public servant or *'penjawat awam'* can be found in the case of *Dr Che Wan Fadhil bin Che Wan Putra dan lain lain (menuntut bagi pihak mereka sendiri dan bagi pihak 127 orang yang lain) lwn Universiti Teknologi Malaysia* [2010] 9 MLJ 736; [2010] 8 CLJ 845. In that case, the plaintiffs were lecturers employed by the defendant which is a statutory body created under the Universities and University Colleges Act 1971 ('Act 30'). Mohd Zawawi Salleh J (as His Lordship then was) observed as follows: F G

> [12] Adalah tidak dipertikaikan bahawa defendan ialah sebuah badan berkanun yang ditubuhkan di bawah Akta Universiti dan Kolej Universiti 1971 (Akta 30). Seksyen 7 Akta 30 dan s. 3 Perlembagaan UTM secara jelas memperuntukkan bahawa defendan ialah suatu pertubuhan perbadanan yang kekal turun temurun dan mempunyai kuasa penuh di bawah nama itu untuk mendakwa dan didakwa di dalam semua mahkamah. Defendan juga mempunyai dan berkuasa menggunakan suatu meteri biasa dan dari semasa ke semasa memecahkan, menukar, mengubah dan membuat baru meteri itu sebagaimana yang difikirkan patut olehnya.
>
> [13] Berhubung dengan pekerja, Perlembagaan UTM memperuntukkan dalam s. 6 seperti berikut:
>
> 6(i) Tertakluk kepada peruntukkan Perlembagaan ini, universiti hendaklah mempunyai kuasa-kuasa yang berikut:
>
> (p) melantik dan menaikkan pangkat pekerja universiti; H I

A (q) mengadakan jawatan dan kedudukan yang diperlukan bagi menjalankan fungsi kakitangan universiti, termasuk skim perkhidmatan, tangga gaji, cuti dan tatatertib;

(s) membuat Skim Pencen Persaraan atau Skim Kumpulan Wang Simpanan bagi faedah pekerja universiti dan membuat perkara-perkara dengan pertubuhan B atau orang lain bagi menubuhkan skim-skim itu.

[14] Berhubung dengan peruntukan kewangan pula, s 39(1) memperuntukkan bahawa Lembaga hendaklah, tidak kurang daripada empat (4) bulan sebelum berakhirnya satu tahun kewangan, meluluskan anggaran hasil dari perbelanjaan lengkap bagi universiti bagi tahun kewangan berikutan dan mengemukakan C anggaran itu, bersama dengan ulasan Lembaga mengenainya, kepada Menteri. Seksyen 43(1) pula memperuntukkan bahawa Lembaga, boleh bagi pihak universiti, menerima harta dan wang sebagai pemberian, hadiah, pemberian berwasiat, subsidi, legasi atau selainnya bagi membantu kewangan universiti mengikut apa-apa syarat yang ditetapkan olehnya. D

[37] Based on the observation made by His Lordship in that case, it can be seen that Act 30 has similar provisions as in Act 397 herein in terms of being a body corporate, appointments of officers, finances, etc. His Lordship then E found as follows:

[15] Oleh itu, dapatlah disimpulkan bahawa defendan bukanlah sebuah jabatan kerajaan dan plaintif-plaintif bukanlah penjawat awam. Mereka hanya dianggap sebagai penjawat awam. *Sekiranya mereka ialah penjawat awam, tentunya tidak perlu untuk menganggap mereka sebagai penjawat awam. Tujuan menganggap mereka* F *sebagai penjawat awam adalah untuk tujuan tertentu, misalnya, berkenaan dengan kesalahan-kesalahan di bawah Kanun Keseksaan. Plaintif-plaintif tidak tertakluk kepada Perintah-Perintah Am, Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 sepertipenjawat-penjawatawam.* (Emphasis added.)

G **[38]** It is clear from the above judgment that the officers and servants of a statutory body are deemed to be a public servant for a specific purpose for example for prosecution under the Penal Code. As rightly pointed out by His Lordship in that case, if the officers and servants of body corporate are indeed a public servant, there is no necessity for them to be deemed as public servants. H In the instant matter, it is to be noted that officers, servants and agents of MIDA are deemed to be a public servant under s 13 of Act 397. His Lordship Mohd Zawawi Salleh J (as His Lordship then was) continued on this issue by making a reference to a passage in the case of *Sulaiman Mat Tekor & Ors v National Population and Family Development Board* [2009] 7 MLJ 325; [2008] I 10 CLJ 581 as follows:

[16] Pandangan di atas diperkukuhkan lagi dengan keputusan-keputusan kes yang di buat oleh Mahkamah Malaysia, antara lain, kes*Sulaiman Mat Tekor & Ors v National Population and Family Development Board* [2009] 7 MLJ 325; [2008] 10 CLJ 581. Mahkamah menyatakan:

Statutory bodies (or statutory authorities) are entities which are, legally speaking, largely (but not absolutely, as they are subject to some degree of ministerial control) independent of the government. Employees of statutory bodies are not public servants in the sense that they do not belong to the public services under art. 132 of the Federal Constitution. As such, they do not enjoy the protections of arts 135, 136 and 146 of the Federal Constitution. Their contracts of service are not with the Federal Government, but with the respective statutory authorities. Although for the sake of uniformity it is the Federal Government policy that statutory authorities are to adopt service circulars issued by the Public Service Department (the PSD — a very important department of the Federal Government that manages and controls services matters pertaining to government employees of all ranks) in cases where such Circulars are intended to apply to statutory bodies, nevertheless, such services circulars do not automatically apply to such bodies. Hence … for any service circular issued by the Public Service Department to apply to the defendant, the board must first adopt that service circular by way of the regulations. (Emphasis added.)

[39] In the case of *Rosneli Kundor v Kelantan State Economic Development Corporation* [2004] 4 CLJ 492 ('Rosneli'), similar to the applicant's matter herein, the appellant in that case who was employed by the respondent which is a body corporate submitted that she was a member of the public service because she was subjected to the terms and conditions similar to public servants. The Court of Appeal clarified the issue as follows:

Who are the members of the public service? This issue had been decided in *Ramalingam Muthusamy v Chong Kim Fong* [1978] 1 MLJ 83; [1977] 1 LNS 105. In that case it was held that officers of the Federal Land Development Authority are not public officers within the meaning of O 43 r 5(2) of the Rules of the Supreme Court 1957. Public services under the Interpretation Act means the public services mentioned in art 132(1) of the Federal Constitution which sets out a list of public services. However, the Federal Land Development Authority is not one of the services mentioned in the Constitution. Ajaib Singh J (as he then was) at p 85 stated:

Thus there remained four issues to be determined in this matter. First whether under Order 43 rule 5(2) of the Rules of the Supreme Court the consent of the Minister of Finance was necessary before any property in the hands of the garnishees could be seized. Here I agree with Mr. Ramachandran that the officers of the Federal Land Development Authority are not public officers within the meaning of Order 43 rule 5(2) which states that if property liable to seizure by garnishment notice is in the custody or under the control of any public officer in his official capacity then such property shall be so seized only with the consent in writing of the Minister of Finance in the case of a Federal Officer or the Menteri Besar or Chief Minister in the case of a State Officer. Under ss 3 of the Interpretation Act 1967 a public officer is a person lawfully holding, acting in or exercising the functions of a public office and public office itself is defined in the Act as an office in any of the public services. Public services under the Interpretation Act means the public services mentioned in Article 132(1) of the Federal Constitution sets out a list of public services but the Federal Land Development Authority is not one of the services mentioned therein. Ss64 and

65 of the Land Development Ordinance 1956 referred to by Mr. Kulasegaran in support of his contention on this point were irrelevant and inapplicable in determining the question in issue. Under these two ss all members, officers and servants of the Federal Land Development Authority are no doubt public servants within the meaning of the Penal Code and are afforded protections under the provisions of the Public Authorities Protections Ordinance 1948 but they do not by virtue thereof become public officers within the meaning of Order 43 rule 5(2) of the Rules of the Supreme Court.

From the above it could be seen that public servants are those in the public services listed out in art 132(1) of the Federal Constitution. Article 132 provides:

132 Public services

(1) For the purposes of this constitution, the public services are:

(a) the armed forces;

(b) the judicial and legal service;

(c) the general public service of the Federation;

(d) the police force;

(e) (Repealed);

(f) the joint public services mentioned in Article 133;

(g) the public service of each State; and

(h) the education service.

(2) (Not relevant).

(2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (f) and (h) of Clause (1) holds office during the pleasure of the Yang di-Pertuan Agong, and, except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Yang di-Pertua Negeri.

(3) (Not relevant)

(4) (Not relevant).

Article 133 of the Federal Constitution provides: Joint services etc.

(1) Joint services, common to the Federation and one or more of the States or, at the request of the States concerned, to two or more States, may be established by federal law.

(2) Where a member of any of the public services is employed:

(a) partly for federal purposes and partly for State purposes; or

(b) for the purposes of two or more States, the proportion, if any, of his remuneration payable by the Federation and the State or States concerned or, as the case may be, by each of the States concerned,

shall, subject to federal law, be determined by agreement or, in default of agreement, by the Commission whose jurisdiction extends to him.

Only the above categories of members of the public services are protected by art 135 of the Federal Constitution which provides:

Restriction on dismissal and reduction in rank 135 (1) No member of any of the services mentioned in paras (b)–(h) of Clause (1) of art 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank;

Provided that in its application to members of the services mentioned in paras (g) of Clause (1) of art 132 this Clause shall not apply to any law which the legislature of any State, other than Penang and Malacca, may make to provide that all powers and functions of a Public Service Commission of such State, other than the power of first appointment to the permanent or pensionable establishment, be exercised by a Board appointed by the Ruler of such State:

And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this proviso shall be deemed to have been an integral part of this Clause as from Merdeka Day.

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

(The proviso is not relevant).

(3) (Not relevant).

In the present appeal, the learned counsel for the appellant contended the appellant was a member of the ' public service ' of the State of Kelantan. The only reason given that she was a member of the public service was because she was a permanent and pensionable officer of the State Economic Development Corporation (SEDC) Kelantan. He then cited the decision in *Hj Ariffin v Government of Pahang* [1969] 1 MLJ 8; [1968] 1 LNS 45. The learned counsel submitted that the appellant was a member of the public service because she was subjected to terms and conditions applicable to an officer of a public service as contained in the letter dated 23 June 1982. Paragraph (2)(c) of the letter stated as follows:

(2) Tawaran jawatan ini adalah tertakluk kepada syarat-syarat yang berikut di bawah iaitu:

(e) Tuan/puan adalah setiap masa tertakluk kepada Perintah-perintah Perbadanan, Pekeliling-pekeliling dan lain-lain Perintah Pentadbiran dikeluarkan dari masa kesemasa mengenai kerja, kelakuan dan syarat-syarat perkhidmatan pegawai-pegawai dalam Perkhidmatan Awam.

(f) Tuan/puan boleh ditugaskan berkhidmat di mana-mana tempat yang diarahkan oleh Perbadanan.

(3) Jawatan yang ditawarkan ini adalah tetap dan berpencen.

Based on that offer the appellant's counsel submitted that since the post was permanent and pensionable, the case of *Hj Ariffin v Government of Pahang* [1969] 1 MLJ 8; [1968] 1 LNS 45applies. We have gone through the decision and we could not find anything in that judgment which supportsthe proposition by the appellant's counsel. He cited the following passages in the judgment of Raja Azlan Shah J (His Majesty as he then was) at pp. 9 and 10:

With a view to deciding the last ground it is desirable to refer briefly to the Federation Constitution. The English common law rule comprehensively expressed in the Latin expression ' durante bene placito ' (during pleasure) has not been adopted in its entirety in this country. The harsh results of the common law have been mitigated by constitutional provisions designed to improve the position of public servants. Article 132(2A) has, subject to exceptions expressly provided by Federal and State Constitutions, adopted the English common law that every person who is a member of the public service of the Federal or of a State Government holds office during the pleasure of the Yang di-Pertuan Agong or the Ruler or Governor as the case may be. The express exceptions are clearly embodied in art. 135 which put a check on the unabridged exercise of pleasure. The pleasure of the Yang di-Pertuan Agong, or the Ruler or Governor, would still be there, but it has to be exercised in accordance with the statutory obligations of art 135, and it is the breach of these obligations that afford a cause of action. If the termination of service doesnot violate the provisions of art 135, this court is not competent to quash an order terminating the service under item 1 of the First Schedule to the Court of Judicature Act, 1964.

Article 135 therefore gives two-fold protections to persons who come within that article: (1) against dismissal or reduction in rank by an authority subordinate to that which, at the time of dismissal or reduction, has power to appoint a member of that service of equal rank; and (2) against the dismissal or removal without giving them a reasonable opportunity of being heard. It is to be observed that the article applies only to members of any of the services mentioned in paragraphs(b) to (g) of clause (1) of art 132 and that includes 'members of the public service of a State'. Although the Laws of the Constitution of Pahang do not provide exceptions to the doctrine durante bene placito embodied in art 132(2A), the lacunae hasbeen supplemented by the express provisionsof art 135. In other words, for art 135(2) to apply in the present case the plaintiff must in the first instance be a member of the public service of the Government of the State of Pahang. Secondly, he must have been dismissed from service by way of punishment. In the latter case, if the employer exercises his right under the conditions and terms of service and does not terminate his service by order of dismissal by way of punishment, then art 135 has no application.

I am of the view that although the plaintiff did not come under the umbrella of the State Public Services Commission, vide Public Services Commission (Extension of Jurisdiction) Enactment, 1958, he was nevertheless by virtue of his employment a member of the public service of the State and therefore came within the purview of art 135. The disciplinary authority for this officer was the State Secretary: see regulation 31, Cap D, General Orders.

From the above decision it is clear to us that the public servant stated in that case was a public servant because he was a member of the public service of the State of

Pahang. Turning to the present appeal, the appellant's counsel relied solely on the appointment letter dated 23 June 1982 which stated that the post was 'permanent and pensionable'. It is clear to us that the appointment letter was not from the Public Service Commission of the State. The letter of offer came from the Kelantan State Economic Development Corporation, a body incorporated. The appellant did not adduce any other evidence to show that the appellant was a member of the public service of the State of Kelantan.

For the above reasons, we hold that the appellant is not a public servant within the meaning of art 132 of the Federal Constitution and assuch she could not seek the protections given under art 135 of the Federal Constitution.

[40] It is clear that cll 4, 5(e) and 5(h) of the applicant's letter of offer state as follows:

Clause 4

Perkhidmatan tuan adalah Perkhidmatan Tetap dan tuan akan menjalani tempoh percubaan selama satu hingga tiga tahun. Semasa dalam tempoh percubaan, tuan dikehendaki mencarum kepada Kumpulan Wang Simpanan Pekerja (KWSP) mengikut kadar berikut:

Sebelum tuan disahkan dalam jawatan, tuan akan diberi opsyen sama ada untuk memilih Skim Pencen atau Skim KWSP

Clause 5(e)

Tuan adalah tertakluk kepada syarat-syarat perkhidmatan bagi pekerja-pekerja Badan Berkanun, Surat-surat Pekeliling dan lain-lain Arahan Pentadbiran yang dikeluarkan dari semasa ke semasa yang berkaitan dengan kerja, kelakuan dan syarat-syarat perkhidmatan bagi pegawai-pegawai MIDA;

Clause 5 (h)

Tuan adalah dikehendaki melaksanakan tugas-tugas jawatan tuan di mana jua tuan ditempatkan dan lain-lain tugas yang diarahkan oleh MIDA serta sanggup berkhidmat di mana-mana tempat di Malaysia atau di mana-mana negara.

[41] In *Rosneli*, the learned counsel therein took a similar stance as the applicant herein and submitted that the appellant was a member of the public service because she was subjected to terms and conditions applicable to an officer of a public service as contained in the letter dated 23 June 1982. Paragraph (2)(c) of the letter stated as follows:

2. Tawaran jawatan ini adalah tertakluk kepada syarat-syarat yang berikut di bawah iaitu:

(e) Tuan/puan adalah setiap masa tertakluk kepada Perintah-perintah Perbadanan, Pekeliling-pekeliling dan lain-lain Perintah Pentadbiran dikeluarkan dari masa ke semasa mengenai kerja, kelakuan dan *syarat-syaratperkhidmatan pegawai-pegawai dalam Perkhidmatan Awam.*

(f) Tuan/puan boleh ditugaskan berkhidmat di mana-mana tempat yang diarahkan oleh Perbadanan.

A 3. Jawatan yang ditawarkan ini adalah tetap dan berpencen

[42] The applicant's employment contract as extracted in the above and the terms in the letter of offer in *Rosneli* are not all that different. In *Rosneli*, despite the words used in the offer letter was to the effect that the appellant was B subjected to the conditions/terms of service of officers in the civil service, the Court of Appeal found that the appellant was not a public servant. Where as in the applicant's case herein, cl 5(e) of his employment contract specifically states that the conditions/terms of employment are in accordance with the service in MIDA or 'Perkhidmatan MIDA' and not as in the civil service or C 'Perkhidmatan Awam'. Further, it is apposite to note that the applicant's employment contract was not issued by the Public Service Commission but instead by MIDA as a body corporate.

D **[43]** Premised on the authorities cited in the above, it is clear that the applicant does not belong to the Public Service under the Federal Constitution and therefore is not a public servant. Accordingly, the safeguards for civil servants provided in art 135(1) of the Federal Constitution does not apply to the applicant.

E

THE FUNCTION OF MIDA

[44] Having addressed on the establishment of MIDA as a body corporate 'Authority' created by Act 397, it is of the considered view that MIDA does not F perform a public duty or function in hiring its employees and in dealing with matters related to their promotions. In other words, there is no public law element in the applicant's employment contract. In issuing the letter of 10 July 2019 where the applicant was informed that he is not confirmed on his acting post and for promotion to Grade 10 and returning the applicant to his G substantive position at Grade 9, that act of MIDA does not fall within the realm of public law. The decision of MIDA in returning the applicant to his substantive position is not a statute-based decision but instead was made pursuant to the employment contract (which has no public law element) between the applicant and MIDA. There is absolutely no legal and statutory H duty on the part of MIDA whether by statute or any other legal instruments to confirm the applicant in Grade 10 or to compel MIDA to perform any of the prayers sought by the applicant in encl 2. It is the management prerogative of MIDA to exercise discretion concerning the employment of their officers and servants including in matters relating to their promotion.

I

[45] In *Domnic Selvam a/l S Gnanapragasam v Kerajaan Malaysia & Ors* [2007] 2 MLJ 761; [2006] 8 CLJ 114, the applicant who was given the acting rank of Deputy Superintendent of Police (DSP) was then reinstated to his original rank of Assistant Superintendent of Police (ASP). A disciplinary

action against him ensued thereafter. Dissatisfied with the so-called demotion in rank, the plaintiff brought the action against the defendants seeking, inter alia, a declaration that the 'demotion' in rank from the rank of DSP to the rank of ASP against him was null and void; a declaration that the disciplinary action taken against him was null and void; and an order that the rank of DSP be reverted back to him with effect from 16 February 1998. Abdul Malik Ishak J (as he then was) stated as follows:

To The Heart Of The Matter

[22] It is the stand of the defendants that the plaintiff was at the material time holding the rank of Assistant Superintendent of Police (ASP). The rank of ASP is the actual substantive rank held by the plaintiff. The plaintiff was, vide the letter dated 21 January 1998 (see exh. 'AAM1' of encl. 25), transferred from Bukit Aman, Kuala Lumpur to Taiping, Perak with the acting rank of Deputy Superintendent of Police (DSP). This acting rank of DSP was given to the plaintiff merely as an acting rank and nothing else. Regulation 2 of the Public Services Promotion Board Regulations1986 defines the word 'acting' in this way:

> acting: means where an approval is granted to an officer to exercise full time the duties attaching to a post of a higher Grade than his substantive Grade within the relevant Scheme of Service of the officer concerned whether with a view to promotion or otherwise;

There is no guarantee that the plaintiff who was acting on the rank of DSP could be confirmed. Unless confirmed, the plaintiff shall otherwise uphold the substantive rank of ASP.

[23] Whether the plaintiff is to be confirmed or not to be confirmed on his acting rank of DSP, it is entirely the management prerogative of the defendants. Regulation 9 of the Public Services Promotion Board Regulations 1986 stipulates as follows:

> 9. In the exercise of its functions, a Promotion Board shall abide by the principles set out in the General Orders or other administrative orders or directives for the time being lawfully issued and in force.

The Promotion Board may shortlist candidates in any promotion exercise and this is stipulated in reg 12 of the Public Services Promotion Board Regulations 1986. The Promotion Board too may, in its discretion, promote the reserved candidates in a promotion exercise within a period of six months from the date of the announcement of the decision of the Promotion Board (see reg 14 of the Public Services Promotion Board Regulations 1986). All candidates in a promotion or acting exercise shall be notified by the Promotion Board of its decision. And the decision of the Promotion Board shall be provisional and is not confirmed until all the appeals in respect of a particular promotion exercise have been determined (see reg 15 of the Public Services Promotion Board Regulations 1986). An Appeal Board after considering the appeal may confirm or vary the decision of the Promotion Board concerned, or may remit the case to the Promotion Board concerned for rehearing and the result of its deliberation shall be duly conveyed to the Appeal Board to enable it to come to a decision on the appeal. In implementing the decision of the Appeal Board, the Promotion Board concerned may alter the effective date of

promotion and the order of seniority of the officer concerned provided that it shall not affect the promotion per se of the successful officer. It must be borne in mind that the decision of the Appeal Board shall be final (see reg 22 of the Public Services Promotion Board Regulations 1986).

[24] Regulation 19 of the Public Services Promotion Board Regulations 1986 stipulates that any officer who is eligible for consideration in a promotion or acting exercise and who is aggrieved by the decision of the Promotion Board concerned, may appeal to the Appeal Board. *It must be emphasised that the decision of the Appeal Board shall be final. It is part and parcel of my judgment that whether a public service officer can be confirmed or promoted is a non-justifiable issue because it is the sole management prerogatives of both the Promotion Board and the Appeal Board under the Public Services Promotion Board Regulations 1986. In Gabongan Kesatuan Pekerja-Pekerja dalam Perkhidmatan-Perkhidmatan Kerani dan Bersekutu Kerajaan v Ketua Pengarah Perkhidmatan Awam & Anor* [1998] 5 MLJ 209; [1997] 1 LN 251, the Amalgamated Union of Employees in Government Clerical and Allied Services ('Union') sought for an order of mandamus directing the respondents there to implement the decision of the Public Services Tribunal who has directed the affected members of the Union to be confirmed in their respective positions. The respondents argued that since they believed that the decision of the Public Services Tribunal was wrong, they would not be implementing the decision of the said tribunal. In issuing the order of mandamus, the court held that since the respondents there did not, at any time, make an application for certiorari to quash the decision of the Public Services Tribunal the respondents there were bound to comply with the decision of the said tribunal. The court also held that the Public Services Tribunal had heard and determined the anomaly which was not disputed by the respondents there. The court further held that the decision of the Public Services Tribunal was final, conclusive and binding on all the parties to the anomaly and its decision could not be challenged, appealed against, reviewed, quashed or called in question in any court. But the court noted that the Public Services Tribunal being an inferior tribunal was still subject to judicial review. The respondents there argued that the decision of the Public Services Tribunal was null and void in that the said tribunal had acted in excess of its jurisdiction. *The court, however, was of the view that the issues in regard to s 13(g) of the Public Service Tribunal Act 1977 was entirely the management prerogative of the respondents there.* (Emphasis added.)

[46] In *Ang Ek Koon v Director, Public Works Department Sarawak & Ors* [2020] MLJU 594; [2020] 7 CLJ 423 ('Ang Ek Khoon'), the main relief sought by the appellant therein is for damages for not being promoted to the higher salary Grades of J52 right up to VU6 (Jusa C). The Court of Appeal referred to two cases discussed by the learned judge in *Dominic Selvam*; *Rasiah Munusamy v Public Services Commission* [1967] 1 AC 348 and *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298 and stated as follows:

[32] In *Rasiah Munusamy v Public Services Commission* [1967] 1 AC 348, the appellant was terminated from his position asan assistant probationary passport officer. His appointment letter stated that he would become eligible for confirmation after three years. His appointment as assistant probationary passport

officer was terminated by the Public Service Commission when it was discovered that he did not pass the School Certificate Examination. His dismissal was upheld by the High Court and the former Federal Court. His further appeal to the Privy Council was dismissed. On the issue of the meaning of eligibility for confirmation, Lord Hodson, speaking for the Privy Council at p 360, para F, said as follows:

> *'Eligible for' is not equivalent to 'entitled to' and means no more than 'fit' to be chosen for.*

[33] In the case of *Dr Amir Hussein bin Baharuddin v Universiti Sains Malaysia* [1989] 3 MLJ 298, the appellant was reappointed as Dean for a period of two terms but was not reappointed thereafter. The relevant statutory provision, that is, s 18(6) of the University's Constitution stated that a Dean is 'eligible' for reappointment. In respect of the meaning of eligibility, Edgar Joseph Jr J, at p 300 (MLJ) para I, left, said as follows:

> By 'eligible', as applied to the selections of persons, means simply 'legally qualified' or 'fit to be chosen' (per Lord Chelmson in *Baker v Lee*).

... Clearly, the applicant was eligible for re appointment as dean and in deed, there was no dispute on this score. *However, the fact that he was eligible as such could, in no way, confer upon him an entitlement to that appointment.*

[47] The Court of Appeal in *Ang Ek Koon* concluded as follows:

> 'We reiterate that the appellant has based his claim for damages on the assumption that he would have been promoted to Grade J52 (KUP), J54 (Tambahsentara), J54 and VU6 (Jusa C). But we find that it is presumptuous on the part of the appellant to plead that he would have been promoted if not for the LSB that was wrongly set up by the State Secretary. *As we stated earlier, promotion is not an entitlement. In the instant case, although the processing of the promotion application was delayed as stated in the letter of the State Secretary dated 9 October 2012 because of the pending disciplinary investigation, it is not the same thing as saying that the appellant would have been undoubtedly promoted if not for the setting up of the LSB.* Thus, it would be fair to conclude that the basis of the claim contains a considerable element of speculation, that is, in the years between 2010 to the time of institution of this suit, he would have been definitely promoted from J48 to VU6 (Jusa C).

[48] It can be garnered from the authorities cited in the above that in matters relating to promotion, it is the prerogative of the employer to decide. Eligibility to be promoted cannot be equated with entitlement. It is not for the court to go behind the reasons as to why the applicant is not promoted to Grade 10 and usurp the powers vested with the management of MIDA to make a finding. The court cannot re-evaluate the evaluation done on the applicant and substitute its opinion with that of MIDA.

[49] Finally, this court agrees with the respondents' contention that the respondents are wrongly named by the applicant as their job titles or positions

A are not entities recognised under Act 397. The only entity created by Act 397 is MIDA pursuant to s 3(1) of the same Act and MIDA is not named as a party herein.

B **[50]** The first respondent is the CEO of MIDA who is appointed under s 3D of Act 397 and a member of the Board pursuant to s 3A of the same Act. The CEO performs the duties under the directions of the Board pursuant to s 3D(3) and s 7A of Act 397. The CEO is not an entity under Act 397. Under s 6B of Act 397, the Board where the CEO is one of the members performs the functions and exercises the powers of MIDA and such exercises shall be deemed C to be performed or exercised by MIDA as the Authority. MIDA is therefore the only entity under Act 397 and all actions and decisions are by MIDA under Act 397.

D **[51]** The second, third, fourth and fifth respondents are job titles or position held by individuals in MIDA and just like the first respondent, they are not entities under Act 397. The fourth, fifth and sixth respondents for that matter are committee members appointed under s 7B of Act 397 who make recommendations and not decisions. The respondents therefore cannot be said E to be the decision makers, pursuant to Act 397.

[52] In *Wang Choon Yin lwn Dato' Seri Hj Mustafar bin Hj Ali, Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) dan lain-lain* [2020] 5 MLJ 793 ('Wang Choon Yin') the appeal was against part of the High Court's F decision where the High Court had allowed the objections raised by the attorney general at the leave stage for judicial review on the ground that there was a misjoinder of the first , third and fifth respondents as they were not the ones who made the impugned decisions individually but collectively as the Lembaga Tatatertib Kumpulan Sokongan (No 1) of the Immigration G Department and Lembaga Rayuan Tatatertib Perkhidmatan Awam, Suruhanjaya Perkhidmatan Awam respectively. In upholding the High Court's decision, the Court of Appeal through the judgment of Kamardin Hashim JCA (as he then was) stated as follows:

H > [14] ... *Jika sekiranya permohonan itu ditujukan* terhadap keputusan yang tidak tepat atau *terhadap pihak berkuasa yang membuat keputusan yang dipersoalkan itu tidak tepat, akan menjadikan permohonan untuk mendapatkan kebenaran sebagai tidak berkompeten. Dalam kes rayuan di hadapan kami, kami bersetuju dengan pendirian responden bahawa walaupun perayu telah menyatakan keputusan yang hendak dicabar adalah tepat namun perayu telah menamakan pihak-pihak yang tidak* I *sepatutnya, iaitu responden pertama, responden ketiga dan responden kelima. (Emphasis added.)*

[53] Although the decision of the Court of Appeal in *Wang Choon Yin* relates to an appeal against the decision at the leave stage, the passage cited in the above

would apply equally at this substantive stage. The applicant's application is therefore incompetent.

CONCLUSION

[54] There is no legal or statutory duty imposed on MIDA either by statute or other legal instruments to confirm the applicant in Grade 10 or compel MIDA to perform matters sought in the applicant's application as laid down in encl 2. The matter herein involves process of evaluation of the applicant as an employee and MIDA's discretion as employer to decide on his promotion. MIDA has exercised that discretion and that exercise is not a public duty on the part of MIDA. As an employer, it is up to MIDA and MIDA alone is best suited to decide on the promotion of its employees.

[55] Premised on the above, the applicant's application was dismissed with costs of RM15,000 to the respondents.

Application dismissed with costs of RM15,000 to respondents.

Reported by Dzulqarnain Ab Fatar